105TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
105–52

TO ALLOW REVISION OF VETERANS BENEFITS DECISIONS BASED ON CLEAR AND UNMISTAKABLE ERROR

APRIL 14, 1997.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. STUMP, from the Committee on Veterans' Affairs, submitted–the–following

R E P O R T

[To accompany H.R. 1090]

[Including cost estimate of the Congressional Budget Office]

The Committee on Veterans' Affairs, to whom was referred the bill (H.R. 1090) to amend title 38, United States Code, to allow revision of veterans benefits decisions based on clear and unmistakable error, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

INTRODUCTION

On March 18, 1997, the Ranking Democratic Member of the Committee on Veterans Affairs, the Honorable Lane Evans, along with the Honorable Bob Stump, Chairman of the Committee on Veterans Affairs, the Honorable Bob Filner, Ranking Member of the Subcommittee on Benefits, the Honorable Barney Frank, the Honorable Carolyn Maloney, the Honorable Donald Payne, the Honorable Phil English, and the Honorable William Lipinski introduced H.R. 1090, to allow revision of veterans benefits decisions based on clear and unmistakable error.

The full Committee met on March 20, 1997 and ordered H.R. 1090 reported favorably to the House by unanimous voice vote.

SUMMARY OF THE REPORTED BILL

H.R. 1090 would:

1. Amend chapter 51 of title 38, United States Code, to codify existing regulations which make decisions made by the Secretary

at a regional office subject to revision on the grounds of clear and unmistakable error by the Regional Office.

2. Amend chapter 71 of title 38, United States Code, to make decisions made by the Board of Veterans' Appeals subject to revision on the grounds of clear and unmistakable error.
3. Permit appeal to the Court of Veterans Appeals of any decision made before, on, or after enactment on the grounds of clear and unmistakable error.

BACKGROUND AND DISCUSSION

The VA claim system is unlike any other adjudicative process. It is specifically designed to be claimant friendly. It is non-adversarial; therefore, the VA must provide a substantial amount of assistance to a veteran seeking benefits. When the veteran first files a claim, VA undertakes the obligation of assisting the veteran in the development of all evidence pertinent to that claim. There is no true finality of a decision since the veteran can reopen a claim at any time merely by the presentation of new and material evidence.

Any decision may be appealed within one year. The appeal is initiated by a simple notice of disagreement after which VA is obligated to furnish a detailed statement of the facts and law pertinent to the claim.

The reported bill would make decisions by VA Regional Offices and the Board of Veterans Appeals (BVA) subject to review on the grounds of clear and unmistakable error. Regional office decisions are currently reversible on this basis by regulation, but BVA decisions are not. *Smith* v. *Brown*, 35 F. 3d. 1516, 1523 (Fed. Cir. 1994). The bill would effectively codify this regulation, and extend the principle underlying it to BVA decisions.

The BVA is an appellate body located in Washington, DC, responsible for reviewing claims on *a de novo* basis. Under current law, a veteran may file a motion for reconsideration at the BVA at any time after the decision has been made. If the Chairman of the BVA grants a motion for reconsideration, the matter is referred to an enlarged panel for a final decision. Reconsideration of the claim is conducted under the law as it existed at the time of the initial decision, and if an allowance on the basis of obvious error is ordered, the veteran receives the benefit retroactive to the date of the initial claim. If the request for reconsideration is denied, the veteran has no right of appeal.

During fiscal years 1991 through 1996, approximately 4,400 motions for reconsideration were filed, and more than 900 (21 percent) of these motions were granted. A panel of at least three Board members rendered a new decision. Of the new decisions 75 percent were allowances or remands. As of February 28, 1997, there were 53,434 appeals pending at the BVA and the average BVA response time was 513 days.

"Since at least 1928, the VA and its predecessors have provided for the revision of decisions which were the product of 'clear and unmistakable error'. (citations omitted) The appropriateness of such a provision is manifest." *Russell* v. *Principi*, 3 Vet. App. 310, 313 (1992) (en banc). Congress has provided the Board of Veterans Appeals (but not the regional office or agency of original jurisdic-

tion) authority to correct obvious errors. 38 U.S.C. § 7103(c). In arguments before the Court of Veterans Appeals and testimony before this Committee, the VA has stated that there is no substantive difference between the Board's authority to correct "obvious error" and the agency of original jurisdiction's authority to correct clear and unmistakable error. "The only real difference is that clear and unmistakable error review can be invoked as of right, whereas review for obvious error is committed to the sound discretion of the Board." *Smith*, 1526.

> It must always be remembered that clear and unmistakable error is a very specific and rare kind of "error". It is the kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error. Thus even where the premise of error is accepted, if it is not absolutely clear that a different result would have ensued, the error complained of cannot be, *ipso facto*, clear and unmistakable. *Russell* v. *Principi*, 3 Vet. App. 310, 313 (1992) (en banc).

Fugo v. *Brown*, 6 Vet. App. 40, 44 (1993). As the court further stated in *Fugo*, clear and unmistakable error is a form of collateral attack on an otherwise final decision, and there is a very strong presumption of validity that attaches to such decisions.

As noted above, this legislation would allow a claimant to raise a claim of clear and unmistakable error with regard to a Board decision. However, it does not follow that by merely averring that such error has occurred, a veteran can successfully attack an otherwise final decision. At least in cases brought before the Court of Veterans Appeals,

> while the magic incantation "clear and unmistakable error" need not be recited *in haec verba*, to recite it does not suffice, in and of itself, to reasonably raise the issue . . . [S]imply to claim clear and unmistakable error on the basis that previous adjudications had improperly weighed and evaluated the evidence can never rise to the stringent definition of clear and unmistakable error . . . Similarly, neither can broad-brush allegations of "failure to follow the regulations" or "failure to give due process," or any other general, non-specific claim of "error".

Fugo v. *Brown*, 43–44. Given the Court's clear guidance on this issue, it would seem that the Board could adopt procedural rules consistent with this guidance to make consideration of appeals raising clear and unmistakable error less burdensome.

Finally, the Committee notes that an appellate system which does not allow a claimant to argue that a clear and unmistakable error has occurred in a prior decision would be unique. This bill addresses errors similar to the kinds which are grounds for reopening Social Security claims. Under the Social Security system, a claim may be reopened at any time to correct an error which appears on the face of the evidence used when making the prior decision. That is certainly the intent of the original VA regulation allowing correc-

tion of such decisions, no matter when the error occurred or which part of the VA made the error. Given the pro-claimant bias intended by Congress throughout the VA system, the Committee concludes that this legislation is necessary and desirable to ensure a just result in cases where such error has occurred. The Committee directs the BVA to monitor the effect of this legislation and to include the data in its annual report.

STATEMENT OF ADMINISTRATION'S VIEWS

The Committee has not requested the Administration's comment on this bill. However, H.R. 1090 is identical to H.R. 1483 passed by the House during the 104th Congress. In testimony before the Committee on October 12, 1995, the Administration opposed H.R. 1483 on the grounds that authorizing appeals on the grounds of clear and unmistakable error would add to the claims backlog at the Board. The Committee requested the Board to provide data to support its position, but the Board indicated it could not provide such data.

SECTION-BY-SECTION ANALYSIS

Section 1(a) would amend chapter 51 of title 38, United States Code, to codify existing regulations which make decisions made by the Secretary at a regional office subject to revision on the grounds of clear and unmistakable error.

Section 1(b) would amend chapter 71 of title 38, United States Code, to make decisions made by the Board of Veterans' Appeals subject to revision on the grounds of clear and unmistakable error.

Section 1(c) would make the provisions of this bill applicable to any determination made before, on, or after the date of the enactment of this Act.

OVERSIGHT FINDINGS

No oversight findings have been submitted to the Committee by the Committee on Government Reform and Oversight.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The following letter was received from the Congressional Budget Office concerning the cost of the reported bill:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 10, 1997.

Hon. BOB STUMP,
Chairman, Committee on Veterans' Affairs,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1090, a bill to amend title 38, United States Code, to allow revision of veterans benefits decisions based on clear and unmistakable error.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mary Helen Petrus, who can be reached at 226–2840.

Sincerely,

JUNE E. O'NEILL,
Director

Enclosure

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

H.R. 1090—A bill to amend title 38, United States Code, to allow revision of veterans benefits decsions based on clear and unmistakable error.

As ordered reported by the House Committee on Veterans' Affairs on March 20, 1997

CBO estimates that H.R. 1090 would raise administrative costs over the first two or three years after enactment by $1 million to $2 million in total, but in the longer run administrative costs would rise by less than $500,000 a year. In addition, CBO estimates that the bill would have a direct spending impact of less than $500,000 a year through 2002. Because the bill would raise direct spending, it would be subject to pay-as-you-go procedures. H.R. 1090 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act of 1995 and would not affect the budgets of state, local, or tribal governments.

Section 1(a) would have no budgetary impact because it would codify the current procedure for revising veterans' claims decisions made by regional offces. Other sections of the bill would give certain veterans new rights and opportunities for appeal. Under current law, a veteran may appeal a regional offce's decision to the Board of Veterans Appeals (BVA). Once the BVA has rendered a decision, a veteran may appeal directly to the Court of Veterans Appeals (COVA) or move for reconsideration of the Board's decision on the basis of "obvious error." The Chairman of BVA reviews the motion and at his discretion may allow it, thus referring the matter to a panel of members for reconsideration. Section 1(b) would require BVA to review decisions challenged on the basis of "clear and unmistakable error." Section 1(c) would make sections 1(a) and 1(b) retroactive and would allow veterans to appeal BVA decisions involving claims of clear and unmistakable error to COVA and other higher courts regardless of a current restriction limiting consideration to cases in which administrative appeals were initiated on or after November 18, 1988.

To obtain revision of a BVA decision under the bill, the claimant must assert "clear and unmistakable error," which is an error of law or fact in the record at the initial decision that compels the conclusion that the decision would have been different but for the error. The "clear and unmistakable error" standard is roughly the same as the current standard of "obvious error." The standard of review, therefore, is not the key change that the bill would make in the procedure. Rather, the bill would eliminate the Chairman's

discretion in reconsideration and make the review of a BVA decision a matter of right.

The administrative costs of the bill would have two parts--a continuing increase in costs associated with the annual caseload under current law and a larger initial increase that would stem from retroactively extending the right to review. CBO assumes that the longer run increase in caseload resulting from this bill would be a portion of the requests for reconsideration under current law that are denied. From 1991 to 1995, BVA denied reconsideration for about 500 motions a year, including motions that might have been based on clear and unmistakable error. Data from the Department of Veterans Affairs indicate that the average cost per case is about $1,000. Because the marginal cost of each new case would be less than $1,000 and BVA would have to review fewer than 500 new motions a year, the long-run costs of administration would be less than $500,000 annually.

The number of veterans who would demand review of past cases based on clear and unmistakable error is the key uncertainty in estimating the costs of the bill. Whether or not the case involved such error, the demand would still add to BVA's workload and costs because it would at least have to screen the demands and document its conclusions. Nevertheless, the current process for adjudicating veterans claims allows many opportunities for appeal, and it is probable that most veterans having claims pursue them under current law. CBO estimates that up to 2,000 veterans would return to BVA for reconsideration under the bill and add about $1 million to $2 million to BVA's administrative costs, currently about $38 million annually, during the first three years after enactment.

By their nature, claims of clear and unmistakable error, if sustained, are very likely to lead to additional benefits to the claimant. The bill would raise direct spending to the extent that the cases involved such benefits as disability compensation, pension benefits, or survivor benefits. Although the extra administrative costs of the bill would not cumulate from year to year, the additional benefits would be paid for the life of the veteran or surviving beneficiary. How much direct spending would rise depends on the caseload and average award in benefits, both of which are very uncertain. Because veterans have many opportunities under current law to appeal claims decisions, CBO estimates that a small number of additional cases would be successfully appealed under the bill. Also, it is unlikely that the average annual benefit involved in such a case would be more than $1,000 to $2,000. Thus, the bill would probably increase direct spending by less than $500,000 a year in 1998 and the next several years.

The CBO staff contact for this estimate is Mary Helen Petrus, who can be reached at 226–2840. This estimate was approved by Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

INFLATIONARY IMPACT STATEMENT

The enactment of the reported bill would have no inflationary impact.

APPLICABILITY TO LEGISLATIVE BRANCH

The reported bill would not be applicable to the legislative branch under the Congressional Accountability Act, Public Law 104–1, because the bill would only affect certain Department of Veterans Affairs benefits recipients.

STATEMENT OF FEDERAL MANDATES

The reported bill would not establish a federal mandate under the Unfunded Mandates Reform Act, Public Law 104–4.

STATEMENT OF CONSTITUTIONAL AUTHORITY

Pursuant to Article I, section 8 of the U.S. Constitution, the reported bill would be authorized by Congress' power "{T}o provide for the common Defence and general Welfare of the Untied States."

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 38, UNITED STATES CODE

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PART IV—GENERAL ADMINISTRATIVE PROVISIONS

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CHAPTER 51—CLAIMS, EFFECTIVE DATES, AND PAYMENTS

SUBCHAPTER I—CLAIMS

Sec.
5101. Claims and forms.
5102. Application forms furnished upon request.
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5109A. Revision of decisions on grounds of clear and unmistakable error.
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SUBCHAPTER I—CLAIMS

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§ 5109A. Revision of decisions on grounds of clear and unmistakable error

(a) A decision by the Secretary under this chapter is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised.

(b) For the purposes of authorizing benefits, a rating or other adjudicative decision that constitutes a reversal or revision of a prior

decision on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.

(c) Review to determine whether clear and unmistakable error exists in a case may be instituted by the Secretary on the Secretary's own motion or upon request of the claimant.

(d) A request for revision of a decision of the Secretary based on clear and unmistakable error may be made at any time after that decision is made.

(e) Such a request shall be submitted to the Secretary and shall be decided in the same manner as any other claim.

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PART V—BOARDS, ADMINISTRATIONS, AND SERVICES

CHAPTER 71—BOARD OF VETERANS' APPEALS

§ 7111. Revision of decisions on grounds of clear and unmistakable error

(a) A decision by the Board is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised.

(b) For the purposes of authorizing benefits, a rating or other adjudicative decision of the Board that constitutes a reversal or revision of a prior decision of the Board on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.

(c) Review to determine whether clear and unmistakable error exists in a case may be instituted by the Board on the Board's own motion or upon request of the claimant.

(d) A request for revision of a decision of the Board based on clear and unmistakable error may be made at any time after that decision is made.

(e) Such a request shall be submitted directly to the Board and shall be decided by the Board on the merits, without referral to any adjudicative or hearing official acting on behalf of the Secretary.

(f) A claim filed with the Secretary that requests reversal or revision of a previous Board decision due to clear and unmistakable error shall be considered to be a request to the Board under this section, and the Secretary shall promptly transmit any such request to the Board for its consideration under this section.

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